

**Utility Solid Waste Activities Group**

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U S W A G

May 29, 2008

By Electronic Submission and First Class Mail

Department of the Interior  
Natural Resource Damage Assessment & Restoration Program  
Mail Stop 3548  
1849 C Street, NW  
Washington, DC 20240

Re: Comments on Proposed Rule to Amend the Regulations on  
Natural Resource Damages for Hazardous Substances, RIN 1090-AA97

Dear Sir or Madam:

The Utility Solid Waste Activities Group ("USWAG") submits these comments on the amendments to the natural resource damages assessment regulations for hazardous substances proposed by the Department of the Interior ("DOI" or "the Department"). 73 Fed. Reg. 11081 (Feb. 29, 2008).

USWAG was formed in 1978, and is an association of approximately 80 energy industry operating companies and associations, including the Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), and the American Gas Association ("AGA"). EEI is the principal national association of investor-owned electric power and light companies. NRECA is the national association of rural electric cooperatives. APPA is the national association of publicly-owned electric utilities. AGA is the principal national association of natural gas utilities. Together, USWAG members represent more than 85% of the total electric generating capacity of the U.S., and service more than 95% of the nation's consumers of electricity and over 93% of the nation's consumers of natural gas.

USWAG member companies have been subject to claims alleging liability for releases of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), including claims alleging natural resource damages. Consequently, our members have a strong interest in the regulations that govern assessment of such damages. We commend the Department for soliciting public comment on this proposal and appreciate the opportunity to submit these comments. We are also generally in accord with the comments submitted by the Ad-Hoc Industry Natural Resource Damage Group.

USWAG strongly supports amending the regulations to emphasize restoration rather than economic damages for Type B assessment procedures and agrees with the Department that “a ‘restoration-based’ approach to all damages better comports with CERCLA’s overall restoration objectives.” 73 Fed. Reg. at 11083. See also *Ohio v. DOI*, 880 F.2d 432, 444 (D.C. Cir. 1989) (“CERCLA unambiguously mandates a distinct preference for using restoration cost as the measure of damages”). This proposal stems from a recommendation of the Natural Resource Damage Assessment and Restoration Federal Advisory Committee and represents a consensus conclusion of a diverse group of 30 interested stakeholders. As DOI notes, the advisory committee believed this proposed revision of the regulations should be implemented “without delay.” 73 Fed. Reg. at 11082. Given this broad-based consensus, DOI should proceed to promulgate this recommendation and not allow other issues of potentially greater controversy to impede prompt action.

We also support the technical amendments DOI has proposed that would bring the regulations into compliance with two court decisions and would remove an inconsistency in the regulations regarding the appropriate time for development of a Restoration and Compensation Determination Plan. See *id.* at 11083-84. These changes are wholly noncontroversial and should be promulgated without delay.

Finally, USWAG believes that codifying the four examples of project-based assessment methodologies – conjoint analysis, habitat equivalency analysis (“HEA”), resource equivalency analysis (“REA”), and random utility models (*id.* at 11083) – in section 11.83(c)(2) is premature and could needlessly complicate promulgation of the portions of the proposed amendments for which there is broad support. Codification of these methodologies in the regulations was not part of the consensus report by the advisory committee. Moreover, these methodologies, especially conjoint analysis, raise a host of issues as to whether the administrative record contains sufficient evidence to demonstrate the reliability of these methodologies and that they satisfy the statutory standard of “best available procedure.” CERCLA § 301(c)(2), 42 U.S.C. § 9651(c)(2). To be sure, DOI is not proposing to require the use of particular methodologies in a given case (73 Fed. Reg. at 11083), but the availability of alternative methodologies cannot excuse failure to adhere to the statutory requirement that the “regulations shall identify the best available procedures to determine such damages.” CERCLA § 301(c)(2); see *Ohio v. DOI*, 880 F.2d at 439 (“Both Type A and Type B rules were to ‘identify the best available procedures to determine such damages.’”). We understand that other commenters plan to submit expert data questioning the reliability of one or more of these methodologies, and we urge DOI to study these data carefully and make them available for public comment before taking final action on codifying these methodologies.

As we noted above, adding these methodologies to the regulations will complicate this rulemaking and is likely to jeopardize early promulgation of the portions of the proposed amendments for which there is broad support. Indeed, it would also further delay bringing the regulations into compliance with past court decisions, a delay that the Department should no longer tolerate. USWAG therefore recommends that DOI carve the controversial assessment methodologies out of the present proposal and

address their merits in a separate proceeding, while moving ahead expeditiously to promulgate the portions of the proposal based on the advisory committee's report for which there is broad consensus.

We thank you for giving us an opportunity to comment on the proposed amendments. If we can be of further assistance, please contact me at 202-508-5645 or via e-mail at [jim.roewer@uswag.org](mailto:jim.roewer@uswag.org).

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Jim Roewer', with a long horizontal flourish extending to the right.

Jim Roewer  
USWAG Executive Director